83-727

No.

Office - Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,
*Petitioners,*

VS.

ROSIER JENNINGS, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 31, 1983

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## QUESTIONS PRESENTED

1. Is a "disparate impact" or "effects" test appropriate to determine a violation of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and regulations promulgated thereunder?

2. In the alternative, when the Tennessee Medicaid Program provides equal hospital services to the handicapped and nonhandicapped of 14 days per year, per recipient, does such a limit constitute a "disparate impact" or prima facie violation of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and regulations promulgated thereunder when the limit will satisfy all needed hospital care for 95% of the eligible handicapped recipients?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutory Provisions Involved | 2 |
| Federal Regulations Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting Writ | 7 |
| This Court Needs To Correct An Erroneous And Unprecedented Ruling Of The Court Of Appeals Which Seriously Impedes The Ability Of The Tennessee Medicaid Program And Other Entities Subject To Section 504 To Efficiently And Economically Administer Federally Funded Programs Effecting Handicapped Persons | 7 |
| Conclusion | 10 |
| Certificate of Service | 11 |
| Appendix: | |
| Appendix A—Opinion of the Sixth Circuit Court of Appeals dated August 4, 1983 | A-1 |
| Appendix B—518 F.Supp. 877 (1981), *Jennings* v. *Alexander* | A-27 |
| Appendix C—45 C.F.R. §§ 84.1 - 84.5 | A-52 |

**Citations**

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ..... 3

Board of Education of the Hendrick Hudson Central School District v. Rowley, ____U.S.____, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ..... 9

Bryan v. Koch, 627 F.2d 612 (2nd Cir. 1980) ..... 9

Community Television of Southern California v. Gottfried, ____U.S.____, 103 S.Ct. 885, 74 L.Ed.2d 705 (1983) ..... 9

Guardians Association v. Civil Service Commission of New York, 51 U.S.L.W. 5105 (decided July 1, 1983) ..... 7,8

Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974) ..... 3

Jennings v. Alexander, 518 F.Supp. 877, 880 (D.C. Tenn.M.D. 1981) ..... 4

Jennings v. Alexander, ____F.2d____, (6th Cir. 1983) .. 5

N.A.A.C.P. v. The Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) ..... 7,9

Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. Unit A. 1981) ..... 9

Southeast Community College v. Davis, 442 U.S. 397, 410-411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980, 991 (1979) ..... 9

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Lamar Alexander, Governor of the State of Tennessee, et al., respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 4, 1983.

## OPINIONS BELOW

The opinion of the Court of Appeals (reprinted in the Appendix at A.1) is reported at____F.2d____(6th Cir. 1982) (dissenting opinion). The opinion of the Court of Appeals reviews the District Court opinion (reprinted in the Appendix at A. 27) which is reported at 518 F.Supp. 877 (D.C. Tenn., M.D. 1981).

## JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on August 4, 1983 and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 504 of the Rehabilitation Act of 1973, as amended, and codified at 29 U.S.C. § 794 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regualtion shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

## FEDERAL REGULATIONS INVOLVED

45 C.F.R. §§ 84.1-5 of the rules and regulations promulgated by the Secretary of Health and Human Services are set forth in the Appendix at A. 52.

## STATEMENT OF THE CASE

This case involves the legality of a decision by the Tennessee Medicaid Program to reduce the number of inpatient hospital days the program provides in a fiscal year to each elegible recipient from 20 to 14.[1] At issue is whether or not this reduction violates § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (hereinafter § 504) and regulations promulgated thereunder. The reduction was scheduled to go into effect on August 15, 1980, along with other program reductions to ensure the continued existence of the financially strapped Medicaid program. The Respondents, Plaintiffs below, all Tennessee Medicaid recipients, filed suit on August 14, 1980 to enjoin these proposed changes.[2] Named as Defendants, Petitioners in this Court, were the Governor of Tennessee and three (3) other State officials responsible for administration of the Medicaid program.

With respect to the reduction in inpatient hospital days, the Respondents argued, *inter alia,* that the reduction violated § 504 in that it effected the handicapped more adversely than the nonhandicapped. Evidence presented at trial, which commenced on February 17, 1981, established that during the preceeding fiscal year of 1979-80, there were 341,960 persons eligible to receive Medicaid services in Tennessee. Of this number, 90,668 were classified as handicapped and 16,852 of them used one or more hospital days. Of the remaining 250,332 nonhandicapped

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[1] The Tennessee Medicaid Program is a joint state and federal program providing comprehensive medical care for indigents. 42 U.S.C. §§ 1396a, *et seq.* and Tennessee Code Annotated §§ 14-23-101 *et seq.*

[2] The District Court predicated subject matter jurisdiction on 28 U.S.C. §§ 1331 and 1343, *Hagans* v. *Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) and *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.939 (1946).

recipients, 34,288 were in the hospital for one or more days during the study year. *See, Jennings* v. *Alexander,* 518 F.Supp. 877, 880 (D.C.Tenn.M.D. 1981); A. 31-32. Studies were prepared by the Medicaid program to determine what would have been the effect of a 14-day limitation had it been in place during fiscal year 1979-80. The District Court accurately described the result of the studies:

> [The evidence]. . . showed that for the fiscal year examined, 72.6% of the handicapped users would have been fully served by 14 days of hospital inpatient coverage. Stated otherwise, 27.4% of all handicapped users in 1979-80 needed more than 14 days of inpatient hospital treatment. By contrast, 92.2% of all nonhandicapped users were fully served at 14 days or less, leaving only 7.8% in need of inpatient hosptial care beyond the 14th day. *Id.* at 881; A. 32.

The District Court, in making its own calculations, also found as follows:

> Indeed, the actual impact of the proposed limitation, even in the study year, should be kept in perspective. Since only 18.586% of handicapped eligibles used any inpatient hospital services, and 27.4% of those needed more than 14 days, only about 5% of the handicapped eligibles were in need of more than 14 days of hospital treatment. Thus, 95% would have been fully served at 14 days. *Id.* at 882, n.6; A. 32.

The District Court properly concluded that the proposed reduction in the number of inpatient hospital days did not violate § 504. While agreeing that a "disparate impact" test was appropriate, the Court found that the alleged adverse effect of the reduction on the handicapped simply did not rise to the level of a "disparate impact." *Id.* at 885; A. 40. In so ruling, the Court held that § 504 was never intended to ensure equality of

results but only equal access by the handicapped to programs such as Medicaid. *Id.* A. 42-43. The Court carefully distinguished the present case from those cases where the alleged "disparate impact" amounted to an outright exclusion of the handicapped from the service or benefit in question. *Id.* at 883-884; A. 36-40.

On appeal, a three-judge panel of the Sixth Circuit Court of Appeals, Judge Merritt dissenting, reversed the District Court ruling and remanded the case to the District Court for further proceedings. *Jennings* v. *Alexander,* ____ F.2d ____, (6th Cir. 1983); A.1. The Court of Appeals agreed with the District Court that a "disparate impact" test was appropriate for determining a violation of § 504. In general, this test allows a plaintiff to establish a "prima facie" case if he can show that an activity covered under § 504, though facially neutral, has a "disparate impact" upon the handicapped as opposed to the nonhandicapped. If a "disparate impact" is made out, then the burden shifts to the defendant to justify the disparity of treatment as necessary to achieve a legitimate goal of the activity under scrutiny.

The Court of Appeals, contrary to the District Court, found that the 20 to 14-day reduction, based on the data in the record, constituted a "disparate impact" upon the handicapped. The Court of Appeals found a "disparate impact" solely on the fact that 92.2% of all nonhandicapped who needed hospital care would have all their needs met at a 14-day limit as opposed to 72.6% for the handicapped. Under the Court of Appeals reasoning, there would be a "disparate impact" until these two (2) percentages were equal. Anything short of this equanimity would constitute a prima facie violation of § 504. Accordingly, the Court of Appeals reversed the District Court and remanded the case for further proceedings to determine if the Defendant Medicaid officials could rebut the prima facie violation of § 504.

Judge Merritt, in a vigorous dissenting opinion, found no "disparate impact" in the fact that "some" handicapped will be more adversely effected than the nonhandicapped. *Id.* at____; A. 21. He saw the majority opinion as having turned the "disparate impact" test under § 504 into a results test requiring federally funded programs and services to be equally efficacious in their results to the handicapped and nonhandicapped alike. *Id.* at____; A. 22. Judge Merritt concluded that the majority's ruling created a whole new and unnecessary source of challenges to the state's budgetary process:

> Without a clear, bright line distinction based on access, like the District Court makes, the Court's decision will create a whole new source of challenges to the state budgetary decisions. People with physical ailments depend on a myriad of state services more heavily than do people with no ailments. When a local government decides to reduce the quality, frequency or financing for some service, for example, bus service, some group could make a case of discrimination, for example, by showing that they use the buses more than others. Across-the-board cuts in welfare, social security, education and many other benefits will affect some groups more than others and will open the way to litigation. I do not believe that Congress intended this statute to authorized the federal courts to step in and control the state budgetary process when cuts in appropriations affect asthmatics, or some other class of patients, somewhat more heavily than another group of patients. *Id.* at____; A. 21-22.

Judge Merritt was also of the opinion that no "disparate impact" or "effects" test was appropriate under § 504. *Id.* at ____; A. 25.

## REASONS FOR GRANTING WRIT

### I.

**This Court Needs To Correct An Erroneous And Unprecedented Ruling Of The Court Of Appeals Which Seriously Impedes The Ability Of The Tennessee Medicaid Program And Other Entities Subject To Section 504 To Efficiently And Economically Administer Federally Funded Programs Effecting Handicapped Persons.**

The issues presented by this petition are significant and potentially far reaching. In adopting a "disparate impact" or "effects" test to determine whether or not the Tennessee Medicaid Program violated § 504, the Court of Appeals established a standard applicable to all programs, services or activities covered under § 504. This includes all federally funded health care services, educational programs or transportation services. Furthermore, it could be argued that this standard applies to Title VI (42 U.S.C. § 200d) cases as well. The Sixth Circuit followed closely the rationale of *N.A.A.C.P.* v. *The Medical Center, Inc,* 657 F.2d 1322 (3rd Cir. 1981) (*en banc*) which saw no fundamental distinction between a § 504 and Title VI analysis and applied the same "disparate impact" test to both.

The threshold question presented in this case is whether or not a "disparate impact" or "effects" test utilized by the Sixth Circuit is appropriate to determine a violation of § 504 and regulations promulgated thereunder. This Court has never addressed the question. It did, however, recently deal with the propriety of an "impact" or "effects" test in the context of alleged racial discrimination under Title VI in *Guardians Association* v. *Civil Service Commission of New York,* 51 U.S.L.W. 5105 (decided July 1, 1983). A majority of the Court in *Guardians* held that to sustain an award of compensatory damages under Title VI, disciminatory "intent" as opposed to "effect" must be demonstrated. The Court remained divided, however, on the

precise question of the propriety of an "impact" or "effects" test to establish a violation of Title VI. The petitioners respectfully submit, for reasons expressed by the several justices of this Court in *Guardians,* that an "impact" or "effects" test is equally inappropriate within the context of alleged handicapped discrimination under § 504. Indeed, due to the inherent differences between § 504 and Title VI, there is less justification for an "impact" or "effects" test under § 504. Therefore, the question should be addressed in a §504 context.

In the alternative, if an "impact" or "effects" test is appropriate, there is simply no basis in fact or law to warrant the Court of Appeals' standard for what constitutes a "disparate impact". First, the Court of Appeals ignored the fact that all eligible Medicaid recipients, *handicapped and nonhandicapped alike,* would be provided 14 inpatient hospital days per fiscal year. There was no evidence that the limit would render inpatient hospital benefits a nullity to the handicapped. On the contrary, the evidence showed that a 14-day limit would provide all the needed hospital days for 72.6% of all the handicapped who needed hospital care in a given year. As computed by the District Court, this amounted to satisfying all the hospital needs of 95% of the eligible handicapped Medicaid recipients.

Second, the Court of Appeals' standard is also at odds with the plain meaning of § 504 and regulations promulgated thereunder. Section 504 simply prohibits federally funded programs or activities from excluding, denying or discriminating against handicapped individuals on the basis of a handicapping condition. 29 U.S.C. § 794. No where is equality of results mandated. To the contrary, regulations promulgated by the Secretary of Health and Human Services, applicable to the Tennessee Medicaid Program, specifically interpret § 504 as **not** requiring a federally funded program to ". . . produce the identical result or level of achievement but only an equal opportunity to obtain the same results." 45 C.F.R. § 84.4(b)(2). A. 56.

Third, the standard adopted by the Sixth Circuit is inconsistent with this Court's narrow application of § 504 and similar laws. In *Southeast Community College* v. *Davis,* 442 U.S. 397, 410-411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980, 991 (1979) this Court recognized in § 504 ". . . [a] distinction between evenhanded treatment of qualified handicapped persons", which is required, and "affirmative action" to overcome the disabilities caused by handicaps, which is not required. *See, also, Board of Education of the Hendrick Hudson Central School District* v. *Rowley,* ____U.S.____, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) for a similar interpretation under the Education for the Handicapped Act, 20 U.S.C. § 1412(1). The unwillingness of this Court to liberally construe § 504 is reflected in the recent case of *Community Television of Southern California* v. *Gottfried,* ____U.S.____, 1035 S.Ct. 885, 74 L.Ed.2d 705 (1983) where it was held that § 504 did not require the Federal Communications Commission in the normal course of its business to scrutinize a public television station for violations of § 504.

Furthermore, the petitioners know of no other Circuit which has adopted the erroneous "disparate impact" standard which is now the law in the Sixth Circuit. The other Circuits have only applied a "disparate impact" test under Title VI or § 504 to situations where the handicapped were excluded or denied access to certain covered benefits. This is true even in the cases relied upon by the Sixth Circuit. *N.A.A.C.P.* v. *Medical Center, Inc.,* 657 F.2d 1322 (3rd Cir. 1981) and *Bryan* v. *Koch,* 627 F.2d 612 (2nd Cir. 1980) (denial of access to handicapped and minorities by public hospitals); *Prewitt* v. *United States Postal Service,* 662 F.2d 292 (5th Cir. Unit A. 1981), (denial of access to equal employment opportunities).

Finally, the broad "disparate impact" standard established by the Court of Appeals will invite litigants to embroil the states and other entities in protracted litigation over alternative means of fine tuning federally funded programs and services to achieve

equality of results when in fact the policy determinations for these decisions should be decided by elected public officials.

## CONCLUSION

For the reasons set forth above, the petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit to determine the appropriateness of a "disparate impact" or "effects" test under §504 or in the alternative the propriety of the "disparate impact" standard adopted by the Sixth Circuit in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Petition has been mailed this the 31st day of October, 1983, to the below-referenced counsel.

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